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SUPREME COURT, U. S.

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No. 994

In The

Supreme Court of the United States

October Term, 1967

SHIRELEY JEAN ESTES; LISHA DAWN ESTES; SHAWNA ANNETTE ESTES AND DAVID LAIRD ESTES,
Petitioners,

v.

CAMDEN FIRE INSURANCE ASSOCIATION OF GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION LIMITED; STATE AUTOMOBILE MUTUAL INSURANCE COMPANY; FRANK M. GUSWEILER; STATE OF OHIO AND UNITED STATES OF AMERICA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JURISDICTION

Respondent Camden Fire Insurance Association of General Accident Fire and Life Assurance Corporation, Ltd. (hereinafter called CAMDEN FIRE) questions the applicability of 28 U.S.C. 1257 (3) (Appendix A) cited by the Petitioners to invoke the jurisdiction of this Court in that the section cited deals with review of final judgment of the highest court of a state, whereas the balance of the petition seeks a review of an order of the United States Court of Appeals for the Sixth Circuit affirming a judg-

ment of the United States District Court for the Southern District of Ohio, Western Division.

QUESTIONS PRESENTED FOR REVIEW

Respondent Camden Fire says that three questions are presented for review:

I. Was the petitioners' complaint sincere and truthful?

II. Did petitioners' complaint fail to state a cause of action upon which relief could be granted?

III. Was there proper jurisdiction over all of the party respondents named in the petitioners' complaint?

STATEMENT OF THE CASE

This case arises upon a complaint filed in the United States District Court, Southern District of Ohio, Western Division. The complaint is fully set forth in the Petition for a Writ of Certiorari filed on behalf of petitioners and occupies pages three (3) through twenty-three (23) of the said petition. Motions to dismiss were filed on behalf of all of the respondents. On July 6, 1966 a memorandum opinion and order dismissing the complaint was made and entered by United States District Court Judge John W. Peck. (Appendix B, page 8). Thereafter an appeal was made to the United States Circuit Court of Appeals for the Sixth Circuit and on October 10, 1967 an order affirming the judgment of the Federal District Court was made and entered. (Appendix C, page 11). The case is now pending on a Petition For A Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. The statement of the case set forth by petitioners, consisting, primarily, of the complaint filed in the United States District Court, does not set forth an agreed state-

ment of fact. Respondent Camden Fire does not consider this such a statement of fact which can be considered a record.

THE ARGUMENT

I. Was The Petitioners' Complaint Sincere and Truthful?

The question was answered in the negative by United States District Court Judge John W. Peck and this respondent avers that the finding was correct. A cursory reading of the complaint, which occupies twenty (20) pages of the petitioners' brief, will support the finding. District Court Judge Peck said in his opinion:

> "No claim or contention of the plaintiffs is entitled to be dignified by a discussion of this Court."

There is obviously no attempt to comply with the Federal Rules of Civil Procedure and most particularly Rule 8 (e) (1) (Appendix A, page 7).

II. Did Petitioners' Complaint Fail To State A Cause Of Action Upon Which Relief Could Be Granted?

The United States District Court and the United States Court of Appeals for the Sixth Circuit have both held, in this case, that the complaint failed to set forth a real dispute on the existence of a controversy which arises under the Constitution of the United States or the laws of the United States.

The only complaint made against Camden Fire is that it acted in conspiracy with State Automobile Mutual Insurance Company and Hamilton County, Ohio, Common Pleas Court Judge Frank M. Gusweiler to deny petitioners' rights guaranteed by the Constitution and laws of the United States and thereby violated the Federal Civil Rights Act of 1871, 42 U.S.C. 1983 (Appendix A, page 7).

Under the Civil Rights Act, liability is predicated upon deprivation of Federal rights by virtue of acts under *color of law,* and not upon the validity or invalidity of the law under the color of which defendant acted.

The respondent, Camden Fire, is a private corporation and holds no public office or position of public authority and cannot be said to act "under color of law." This term has frequently been defined by the United States Supreme Court. It has been defined as: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law is action taken 'under color of any statute' within this section." *Picking* v. *Pennsylvania R. Co.,* 151 F.2d 240.

By no stretch of the imagination was respondent "clothed with authority of state law." *Williams* v. *United States,* 341 U.S. 97; *U. S.* v. *Classic,* 313 U.S. 229.

The Circuit Court of Appeals for the District of Columbia in *Williams* v. *Hot Shoppes,* 293 F.2d 835, *cert. den.* 370 U.S. 925 stated:

> "Under the statutes creating civil actions against any person who under color of any statute, etc. deprives any United States citizen of any rights and privileges secured by the Constitution and laws, in order to constitute conduct under 'color of law', defendants refusal to serve plaintiff must be state action, and there must be a deprivation of a right, privilege or immunity secured by the Constitution and laws of the United States."

The Court made it clear that even contact with or regulation by the state did not create "color of law." See also *Williams* v. *Yellow Cab Co. of Pittsburgh,* 200 F.2d 302, *Moffett* v. *Commerce Trust Co.,* 187 F.2d 242.

In *Hardyman* v. *Collins,* 80 F.S. 501; 183 Fed.2d 308, 341 U.S. 651 a case dealing with a different civil rights act than the one referred to by the petitioner but with essen-

tially the same thought, the District Court decision, which was later affirmed by this Court, contained the following language:

> "Before liability under the Civil Rights Statute attaches, there must be a violation of national rights, and such violation must be by the State, one of its agencies, or persons being or claiming to be repositories of state power."

It is well settled that allegations that private persons, such as respondent, violate petitioners' rights contrary to the due process guarantee of either the Fifth or Fourteenth Amendment do not state a substantial and meritorious Federal question sufficient to vest Federal jurisdiction because as a matter of substantive constitutional law, the due process clauses afford protection only against governmental activity through some government agency. *Shelly* v. *Kraemer,* 334 U.S. 1; *Teague* v. *Brotherhood of Locomotive Firemen and Engineers,* 127 F.2d 53; *Givens* v. *Moll,* 177 F.2d 765; *Swank* v. *Patterson,* 139 F.2d 145.

The above authorities amply demonstrate that the Civil Rights Act does not apply to respondent corporation, a private individual. The same would apply to respondent State Automobile Mutual Insurance Company. Also respondent Frank M. Gusweiler, as a judge of the Court of Common Pleas of Hamilton County, Ohio, cannot be liable under 42 U.S.C. 1983 (Civil Rights Act of 1871) for his action in a civil case because in such a case he is not acting under "color of law" as required by the statute. This point will be more fully explored by the brief of respondent Frank M. Gusweiler, but the following cases support this position: *Bottome* v. *Lindsley,* 170 F.2d 705 (10 Cir. 1948) *Cert. den.* 336 U.S. 944 and *Swift* v. *Fourth National Bank,* 205 F. Supp. 563 (M.D. La. 1962).

It would seem clear from the above that the respondents mentioned do not individually fall within the statute and that consequently the mere allegation that they were acting in concert does not place them within the statute.

III. Was There Proper Jurisdiction Over All Of The Party Respondents Named In The Petitioners Complaint?

Respondent Camden Fire contends that the United States District Court and the United States Court of Appeals were correct in ruling that there was no jurisdiction over all of the party respondents named in the complaint because it is obvious from a reading of the caption of the complaint that there was not diversity of citizenship between the petitioners and all of the respondents herein.

CONCLUSION

We submit that the United States District Court was correct in its findings and the United States Court of Appeals correct in its Order Affirming the District Court since the charges made against Camden Fire Insurance Association of General Accident Fire and Life Assurance Corporation, Limited are unsupported by factual allegations and do not state a claim upon which relief could be granted.

Respectfully submitted,

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APPENDIX A

28 United States Code § 1257

Trial judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3)

By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commissions held or authority exercised under, the United States.

42 United States Code § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Federal Rules of Civil Procedure, Rule 8(e)(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

APPENDIX B

(CAPTION OMITTED, CASE NO. 6137)

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

(Filed July 6, 1966)

Before: John W. Peck, District Judge.

In a long, rambling and largely incomprehensibe Complaint in which no attempt is made to comply with the provisions of Rule 8(e), Federal Rules of Civil Procedure, the plaintiffs seek to recover damages in a total amount of $133,200,000.00. The named defendants are two insurance companies, a judge of the Common Pleas Court of Hamilton County, Ohio, the Governor of the State of Ohio and the Attorney General of the United States. Each of the defendants has separately moved for dismissal, and while the various motions have varying alternative provisions, for present purposes each will be considered as a motion to dismiss.

No claim or contention of the plaintiffs is entitled to be dignified by a discussion by this Court. A single quotation from their memorandum in opposition to one of the motions to dismiss will demonstrate this fact. Plaintiffs in that memorandum accuse one of the defendant insurance companies of "advertising falsely that insurance is a protector of society (while in reality defendant is the oppressor) to the citizens of Ohio and the United States of America to build an image of 'God' for the defendant (insurance company) and while at the same time portraying the plain-

tiff Shireley Jean Estes, a claimant as 'scum of the earth'. In support of their tenuous, at best, position, plaintiffs cite only the case of Monroe v. Pape, 365 U.S. 167 (1961). However, even a cursory reading of that case indicates that it is of no conceivable application to the present situation.

While as hereinabove indicated we do not propose to attempt response to the nebulous and scurrilous charges of the plaintiffs, we cannot let the charges against the individual defendants remain on the record unnoticed. The first of these defendants is a most highly regarded member of the state judiciary. In a document curiously captioned "Motion of the Plaintiffs in Opposition to Motion of Defendant (Judge)," it is alleged that in an action in his court one of the plaintiffs 'was victimized and deprived of her rights by the corrupt intentional acts of defendant (Common Pleas Judge), an elected state official, acting under color of statute, ordinances, customs and usage.' Fortunately, this Judge is possessed of such stature in the community that this and numerous other scurrilous charges made by the plaintiffs can do him virtually no harm, but that does not justify their having been made. It need hardly be pointed out that if plaintiffs had complaint concerning whatever transpired in the state trial court full rights of review were available.

To the extent that it can be gleaned from the Complaint, the Governor of Ohio and the Attorney General of the United States are named in their official capacities, and the attacks against them are accordingly less personal. Nonetheless, it is again felt proper to affirmatively hold that the accusations made against these gentlemen, whether as public officials or otherwise, even if construed most favorably to the pleaders allege no cause of action against said defendants.

Similarly, it would be improper to permit charges against two law firms to remain of record without comment. In

their memoranda responding to the separate motions of the insurance companies for dismissal, plaintiffs make the identical charge that each such company was 'acting as a professional runner for (its) law firm . . . . who is now handling this case,' and further accusing each such company of 'creating a monopoly and control of litigation in the State Forum in Ohio, by putting this case into the hands of (its) law firm . . ., to jam and to congest the legal process to cheat plaintiffs.' As in the case of the Common Pleas Judge, these firms are of such stature that these and the other scurrilous attacks made upon them can do virtually no harm, but again they should not be permitted to stand of record without comment.

Contrary to the general practice and the requirements of procedure in this court, one of the plaintiffs signed the Complaint under oath. Nonetheless, both from the tenor of the voluminous memoranda filed by him and from that of his oral argument in court, it seems proper to conclude that to a very large extent this entire action represents the personal vendetta of counsel for the plaintiffs against the insurance industry in general and against the named defendant companies in particular, and against the defendant Common Pleas Judge, rather than a sincere and bona fide attempt to recover monetary damages for the plaintiffs. The staggering amount of the prayer further supports this conclusion. In accordance with the foregoing,

IT IS ORDERED that the Complaint herein should be and it is hereby dismissed for failure to state a claim upon which relief can be granted, and that costs should be and are assessed against plaintiffs.

/s/ John W. Peck
District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

No. 17,379

(CAPTION OMITTED)

ORDER

(Filed October 10, 1967)

Before WEICK, Chief Judge, CELEBREZZE and COMBS, Circuit Judges.

The appeal came on to be heard and was argued by counsel for appellants; counsel for appellees, having waived oral argument, submitted their claims on brief. The Court finds no error prejudicial to appellants in the proceeding and judgment of the District Court.

It is therefore ORDERED that the judgment of the District Court dismissing the complaint be and it is hereby AFFIRMED.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk.

Issued as Mandate: October 31, 1967

Costs: NONE
Filing fee .....
Printing appendix .....
Total .....

A True Copy

ATTEST:

signed: Carl W. Reuss
Carl W. Reuss, Clerk

A True Copy of the Original
Filed 10/31/67
Attest: John D. Lyter, Clerk
By W. Hess Brown, Deputy
Certified 10/31/67